Office - Supreme Court, U. S.
FILED
FEB 21 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 652

CLEO SYRUP CORPORATION,
Petitioner,

vs.

THE COCA-COLA COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL W. FORDYCE,
FRANK E. WILLIAMS,
St. Louis, Missouri,
JOHN A. SIBLEY,
EDWIN W. CANADA,
Atlanta, Georgia,
Attorneys for Respondent.

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
SPALDING, SIBLEY & TROUTMAN,
ROGERS, WOODSON and ROGERS,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Supplemental statement of the matter involved	1
The defendant's basic position	4
The meaning of words	4
Misbranding under the Food and Drug Act of 1906 and the corresponding Food, Drug and Cosmetic Act of 1938	6
The question raised by this defendant is an old one	7

Cases Cited.

Coca-Cola Co. v. Koke Co., 254 U. S. 143, 145, 146	3, 5, 7
Coty v. LeBlume Import Co., 292 F. 264, 266	7
Hall v. United States, 267 F. 795	5
Royal Baking Powder Co. v. Emerson, 270 F. 429, 435	5
Standish Mfg. Co. v. Champion Spark Plug Co., 282 Fed. Rep. 961, l. c. 968, C. C. A., 8th Circuit	5
United States v. Coca-Cola Co., 241 U. S. 265, 289	6, 7

Statutes Cited.

Food and Drug Act of 1906, 21 U. S. C. A., Pars. 9 and 10	6
Food, Drug and Cosmetic Act of 1938, 21 U. S. C. A., Sec. 343	6

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.....,

CLEO SYRUP CORPORATION,
Petitioner,

vs.

THE COCA-COLA COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL STATEMENT OF THE MATTER INVOLVED.

The defendant, Cleo Syrup Corporation, and petitioner herein, was convicted of infringement and unfair competition by the District Court, and the decree was affirmed by the Circuit Court of Appeals.

Not content with the use of the infringing name "Cleo Cola," the defendant displayed its name on the crown or stopper of the bottle in red letters on a white background, the color scheme used by the plaintiff for many years, and the defendant copied the distinctive script in which plaintiff's trademark had been written for many years. The District Court found that the design and appearance of

defendant's successive trademarks warrant the conclusion that the defendant intentionally by progressive steps altered its original trademark for the purpose of simulating and imitating the plaintiff's trademark (R. 2172), and that "the sensible, logical conclusion is that the present similarity was premeditated and intentional. Under these circumstances an infringement may be presumed, but in this particular case there is no occasion for resorting to presumption" (R. 2175).

The defendant attacked the validity of plaintiff's mark and the validity of its registration and claimed that the mark was not entitled to protection because the plaintiff is guilty of "unclean hands" for alleged misbranding. The lower court concluded that the trademark "Coca-Cola" is valid and that the mark was validly registered, but did not deem the defense of "unclean hands" of sufficient moment to require special mention. This was equivalent to an implied finding of fact that the plaintiff is not guilty of misbranding. The use of the name "Cleo Cola" was enjoined and the order for an accountng was withheld "unless on motion of plaintiff it be shown that the continued infringement is imminent or that the past actions of the defendant makes an accounting appropriate and necessary."

The two primary defenses insisted on in the lower court, that the trademark "Coca-Cola" is invalid and that the registration is invalid, have now been abandoned and the petition for certiorari in this case rests alone upon the assertion that the trademark "Coca-Cola" is not entitled to protection because it is alleged that the use of that name as a trademark is in conflict with the Federal Food, Drug and Cosmetic Act of 1938, Section 343 of which prohibits the use of false or misleading labels.

In the lower court plaintiff's syrup labels (DX2, R. 1315; DX3, R. 1317; DX4, R. 1319; DX9, R. 1351) were chal-

lenged as violative of the Federal Food, Drug and Cosmetic Act. The label stated: "A compound syrup; prepared with caffeine, extractives from coca leaves (cocaine removed) and cola nuts, and other flavoring material; colored with caramel."

The defendant's attack on the label was voiced by several expert witnesses, who criticized severely the use of the word "extractives." It was claimed that the word "extractives" was not informative enough and that to make the word informative it is necessary to say "what it is extracted with" (R. 2100-01).

The defendant now seems to have abandoned that ground of attack and rests its petition for certiorari solely upon the ground that the mere use by plaintiff of its well-established trademark "Coca-Cola" constitutes a violation of the Food, Drug and Cosmetic Act of 1938.

Mr. Justice Holmes pointed out:

> "Of course a man is not to be protected in the use of a device the very purpose and effect of which is to swindle the public. But the defects of a plaintiff do not offer a very broad ground for allowing another to swindle him. The defense relied on here should be scrutinized with a critical eye." [1]

That language applies to this defendant, who has been convicted of commercial dishonesty by two courts and is seeking to escape the consequences of its own wrongful acts by invoking an interpretation of the Pure Food and Drug Act, whereas neither the District Court nor the Circuit Court of Appeals under the facts found it necessary to make any interpretation of that statute or any application of it.

---

[1] Coca-Cola Co. v. Koke Co., 254 U. S. 143, 145.

THE DEFENDANT'S BASIC POSITION.

The defendant quarrels, not because the plaintiff's product is harmful, but because it is not harmful. The defendant seeks permission to trespass unlawfully upon plaintiff's good will, to take by fraud complainant's business, not because complainant's product contains cocaine, but because it does not. The defendant asserts error because both courts below fail to find that the public expects cocaine when ordering plaintiff's product when in fact the product contains none. Universal experience supplies the answer to this contention. Indeed, the defendant's position perverts the purposes of the law under which defendant seeks a shelter for its fraud, and, in the language of Mr. Justice Holmes, does "not offer a very broad ground for allowing another to swindle him."

No far-reaching question of public interest can arise out of that miasmic and fraudulent background. Certainly the defendant's right to "reap where it has not sown" is not of such paramount importance as to require that the misbranding statute should be construed to sanction that which is harmful and to condemn that which is innocent. The implications of defendant's argument reach that far.

What this defendant is really asking this Court to do is to go through the record to determine whether the two lower courts committed error in determining, as a matter of fact, that the plaintiff is not guilty of "unclean hands," in the hopes perchance that defendant's misconduct may receive judicial sanction and license.

THE MEANING OF WORDS.

> "It is not the trade meaning, nor even the dictionary meaning, of a term or expression, which governs in unfair competition cases. It is the meaning which, under the condition and circumstances usually attend-

ing sales, would be conveyed to the ordinary purchaser of the article in question. In this respect, the law is the same as in the cases of misbranding or mislabeling." [1]

"Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed." [2]

The meaning of "Coca-Cola" has been judicially determined by this Court. The argument that this defendant now makes was met by this Court many years ago. In meeting the argument, that the trademark Coca-Cola "imports a representation that has ceased to be true," this Court, speaking through Mr. Justice Holmes, said:

"The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source, and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words, Coca-Cola probably means to most persons the plaintiff's familiar product, to be had everywhere, rather than a compound of particular substances." [3]

Moreover, the meaning of Coca-Cola to the public is thoroughly authenticated by the defendant's own witnesses. Defendant's expert witness, Muller, was not only a chemist but a retail druggist. He for many years had sold complainant's product under the trademark Coca-Cola and he stated without equivocation that, when Coca-Cola was called for, it was universally true with all of his customers that they wanted complainant's product (R. V. III, 2130). That fact is nowhere contradicted. It is merely a reitera-

[1] Standish Mfg. Co. v. Champion Spark Plug Co., 282 Fed. Rep. 961, l. c. 968, C. C. A., 8th Circuit;
Royal Baking Powder Co. v. Emerson, 270 F. 429, 435.

[2] Hall v. United States, 267 F. 795.

[3] Coca-Cola Co. v. Koke Co., 254 U. S. 143, 146.

tion by the ordinary purchaser of Mr. Justice Holmes' statement that "Coca-Cola probably means to most persons plaintiff's familiar product to be had everywhere rather than a compound of particular substances."

That principle was applied and tersely stated by the Circuit Court of Appeals:

> "One certainly cannot be charged with misbranding or misdescribing a product by calling it what it is" (R. 2209).

MISBRANDING UNDER THE FOOD AND DRUG ACT OF 1906 AND THE CORRESPONDING FOOD, DRUG AND COSMETIC ACT OF 1938.

There is no substantial difference between the definition of misbranding under the Food and Drug Act of 1906 (21 U. S. C. A., Pars. 9 and 10) and the definition of misbranding under the Food, Drug and Cosmetic Act of 1938 (21 U. S. C. A., Sec. 343). In the latter act the definition is stated with greater conciseness, but each act condemns labeling which "is false or misleading in any particular."

Under the Food and Drug Act of 1906 certain articles sold "under their own distinctive names shall not be considered misbranded." This provision was eliminated from the Food, Drug and Cosmetic Act of 1938, but the elimination of that defense did not in any sense broaden the definitive scope of the act.

In United States v. Coca-Cola Co., 241 U. S. 265, the charge was made under the Food and Drug Act of 1906 that the plaintiff's product was adulterated and misbranded. The contention that the plaintiff's product was sold under its "own distinctive" name was sustained by the lower court as a matter of law (191 F. 431; 215 F. 535).

This Court reversed, holding that the question was one of fact. The Court recognized that a distinctive name was a name that had acquired a secondary meaning but that

meaning must be proved. United States v. Coca-Cola Co., 241 U. S. 265, 289.

But in the latter case, Coca-Cola Co. v. Koke Company, 254 U. S. 143, this Court recognized that Coca-Cola had acquired a secondary meaning. Mr. Justice Holmes, speaking for this Court, said:

> "Whatever may have been its original weakness, the mark for years has acquired a secondary significance, and has indicated the plaintiff's product alone. * * *
>
> "Although the fact did not appear in United States v. Coca-Cola Co., 241 U. S. 265, 289, we see no reason to doubt that, as we have said, it has acquired a secondary meaning in which, perhaps, the product is more emphasized than the producer, but to which the producer is entitled."

This case comes to this:

> "A word means what people understand it to say and there is an end of it." [1]

People understand "Coca-Cola" to mean plaintiff's product — not a compound of substances — "there is an end of it."

THE QUESTION RAISED BY THIS DEFENDANT IS AN OLD ONE.

The exact question was made in the Koke case (254 U. S. 143). In that case the defendant in its answer set up that plaintiff's goods were misbranded and the Food and Drug Act of 1906 was relied upon. The arguments that were made in that case were made in this case.

The Circuit Court of Appeals very properly stated in this case:

> "The question raised by the defendant's second contention was effectively put to rest by the Supreme

[1] Coty v. LeBlume Import Co., 292 F. 264, 266.

Court of the United States in Coca-Cola Company v. Koke Company of America (1920), 254 U. S. 143, in which that Court said (p. 145 of 254 U. S.):

> "'* * * Whatever may have been its original weakness, the mark (Coca-Cola) for years has acquired a secondary significance and has indicated the plaintiff's (Coca-Cola Company's) product alone.'"

The defendant really rests its position on what it terms "a progressive age." The progress that the defendant is contending for is the right to commit a fraud—such a wrong should not be established as a right. It can hardly be said that a decision now which would license a fraud has progressed over a decision which in 1920 condemned the fraud. The progress that the defendant is contending for is progress in retrogression.

Certainly if the Pure Food and Drug Administration is satisfied with respondent's acts defendant should be, especially when this Court has already passed upon this issue, and the decree is interlocutory.

Respectfully submitted,

SAMUEL W. FORDYCE,
FRANK E. WILLIAMS,
St. Louis, Missouri,
JOHN A. SIBLEY,
EDWIN W. CANADA,
Atlanta, Georgia,
Attorneys for Respondent.

FORDYCE, WHITE, MAYNE, WILLIAMS & HARTMAN,
SPALDING, SIBLEY & TROUTMAN,
ROGERS, WOODSON and ROGERS,
Of Counsel.